No. 12548

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WOODWORKERS TOOL WORKS, INC., a corporation,

Appellant,

vs.

WILLIAM J. BYRNE,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

1. The statutory provisions to sustain the jurisdiction of the District Court and of the Court of Appeals are set forth in Appellant's Opening Brief (pp. 1 and 2, pars. 1 and 3).
2. The existence of jurisdiction is shown by the allegations of the second amended complaint in paragraph three thereof, as set forth in Appellant's Opening Brief (pp. 1 and 2, par. 2) [R. 22].

Statement of Facts.

This is an appeal from the judgment entered pursuant to the verdict of the jury in favor of plaintiff and respondent William J. Byrne, and against the defendant and appellant, Woodworkers Tool Works, Inc., an Illinois corporation.

The defendant Woodworkers Tool Works, Inc., a corporation, moved for an order dismissing the action pursuant to Rule 12(b) (2-4-5) of the Federal Rules of Civil Procedure on the ground that the court lacked jurisdiction over the person of the defendant and for insufficiency of process and of the service thereof [R. 6-11]. This motion, after full hearing and after consideration of affidavits and authorities presented by both defendant and plaintiff, was denied by the trial court [R. 6-21]. Thereafter (pursuant to stipulation between counsel for plaintiff, William J. Byrne, and defendant Woodworkers Tool Works, Inc., a corporation) a second amended complaint was filed, a copy of which was duly delivered to counsel for defendant.

Defendant then moved for an order to dismiss the first count or cause of action of the second amended complaint [R. 32-34]. Said motion was granted [R. 34-36]. Defendant then filed its answer and went to trial of the case on the second cause of action. At the close of plaintiff's case defendant moved for a non-suit which motion was denied.

At the close of the trial and after all evidence had been presented by plaintiff and defendant, the defendant moved the court for a directed verdict which the court denied after the jury had brought in a verdict for plaintiff [R. 425-429]. Defendants then moved for a judgment *non obstante veredicto* or in the alternative of a new trial, which, after full hearing, was denied.

Plaintiff's motion to correct the verdict was granted and a corrected judgment was filed [R. 62-68].

The second cause of action of the second amended complaint for personal injuries alleged that plaintiff is a citi-

zen of the State of California and that defendant is and was at all times mentioned a corporation, duly organized and existing by virtue of the laws of the state of Illinois, engaged in manufacturing machine tools and in the business of selling machine tools in the State of California; that the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand ($3000.00) dollars; that at all times mentioned plaintiff was regularly employed by E. George Selby, doing business as Selby Company; that the new Champion panel raiserhead was designed, manufactured and sold by said defendant. That plaintiff was injured when the said panel head, revolving at hundreds of revolutions per minute suddenly broke from structural defects, a piece of which struck plaintiff, directly and proximately causing the injuries and damages to plaintiff described; that plaintiff was strong, active and healthy in body and mind before his injury; that at the time of said injury plaintiff was thirty-three years old, that he was earning and capable of earning from two hundred and sixty dollars ($260.00) to two hundred and seventy-five dollars ($275.00) per month; that due to said injury, plaintiff has been ill and totally disabled from pursuing his usual occupation as a mill worker, or perform any work depending upon full use of his right hand; that ever since the said accident, plaintiff has been under the care of physicians for said injuries and has incurred medical expenses in the sum of two hundred and fifty ($250.00) dollars to the date of the filing of his complaint [R. 22-26].

The answer of the defendant admitted it was engaged in the manufacturing of machine tools; that it sells Champion panel raiser heads, and that it partially manufactured said article (the panel raiser head here in question) [R. 27-31].

The plaintiff, including his own testimony, produced seven witnesses in his behalf. In substance, their testimony revealed the following facts:

That plaintiff was employed by Selby Company in the month of October, 1948, to operate a "Shaper" [R. 78]. That he was earning a salary of $1.60½ per hour, eight hours per day, five days per week [R. 79]. That the Selby Company purchased a new Champion panel raiser head from the defendant company which was delivered to the Selby Company on October 25, 1948 [R. 80]; that the panel head was delivered in a sealed container [R. 105]; that the panel head was installed by an employee of the Selby Company on or about October 25, 1948 [R. 111]; that the employee who installed the panel head was experienced in that duty [R. 100-101]; that the plaintiff was present when the panel head was installed but did not participate in its installation [R. 126]; that the operation of the panel head was tested and given an operation test after it was installed and was found to have been properly installed [R. 114-115]; that the plaintiff was working with soft pine at the time of his injury [R. 86-87-128]; that on October 28, 1949, plaintiff was operating the panel raiser head on a "shaper" when he heard a sharp "click" and dropped immediately below the level of the machine upon which he was working, his right hand being the last portion of his body to drop below the table; that after "things had stopped dropping" plaintiff observed that his hand was cut across the palm and that his little finger "was just barely on" [R. 142-143]. That plaintiff's employer, George Selby, Michael L. Chirby (who installed the panel head) and the shop superintendent, Cornelius Leewenkamp, all observed the panel head, after the injury to plaintiff, and saw a large blowhole in the broken portion of the head

[R. 101-116-7, 132-3]. That the panel head was examined and analyzed by a chemist and engineer, Gough L. Cheney, after it had disintegrated. Mr. Cheney testified [R. 172-173] that the panel head contained structural defects which are visible to the naked eye on the surface of the panel head [R. 178-188]. That there was no evidence of abnormal operation or improper installation of the panel head prior to its breaking [R. 185]. That there was a blowhole at the point where the panel head broke about one-half inch deep [R. 188]; that other blowholes and excessive porosity may be seen in the vicinity of the broken arm [R. 189]; that the porosity and blowholes constitute seventeen per cent of the area of the point of fracture [R. 190]. That there was no evidence that the panel head had struck anything before breaking [R. 179-183-196]. That the excessive porosity of the panel head was even more evident while the panel head was in an unpainted condition during its manufacture [R. 188-189]; that blowholes weaken the strength of steel [R. 191].

Plaintiff was treated by two doctors [R. 228-237] and was examined by a Doctor Ross Sutherland [R. 210]. Doctors Ross Sutherland and Howard F. Detwiler testified that plaintiff's injury was of such a nature that he would be permanently disabled [R. 212, 238]. That plaintiff suffered a "forceful injury" and that his right hand was "chewed up" [R. 236]. That his right hand was in a plaster cast for one month [R. 235, 240]. That plaintiff visited Doctor Detwiler for treatment twenty-five times [R. 237] and Doctor Boyes for further treatment [R. 237]. That plaintiff should undergo reparative surgery [R. 212, 238]. That an operation as recommended would cost $300.00 to $500.00 and would require hospitalization

for a week or more, followed by total disability for approximately eight to ten weeks [R. 215].

Plaintiff testified that he owed approximately $350.00 to $400.00 in doctor bills [R. 202] and that he lost approximately eight months of work with an average weekly earning of $64.00 per week [R. 202].

Defendants Woodworkers Tool Works produced four witnesses in its behalf: Jerome B. Townsend, Salesman for the Woodworkers Supply Company; Elmer H. Preuer, owner of the Woodworkers Supply Company; William Victor Knourek, Vice President in charge of production of defendant Woodworkers Tool Works, and Charles E. Meissner, plant superintendent of defendant company, Woodworkers Tool Works. The testimony of the latter two witnesses was taken by deposition in Chicago, Illinois, and read into the record during the trial.

The testimony of these witnesses, in so far as it touches upon the merits of this appeal, will later be referred to at the appropriate time.

The jury returned its verdict in favor of plaintiff and against defendant. The verdict set plaintiff's special damages at $8000.00 and plaintiff's general damages at $1000.00 [R. 54]. On motion by plaintiff, supported by authorities and by the affidavit of George F. Caldwell, foreman of the jury, to the effect that he had inadvertently made a clerical error in filling out the verdict [R. 64] the trial court ordered a corrected and amended verdict to be filed fixing plaintiff's special damages at $1000.00 and general damages at $8000.00 [R. 67].

The Appellants Contend:

1. That appellant was never served with summons in this action, nor was appellant subject to service of process within the Southern District of California.

2. That appellee failed to produce any evidence of negligence or of causal connection upon appellant's part.

3. That the trial court's charge to the jury of the doctrine of *Res Ipsa Loquitur* was prejudicially erroneous.

4. That the verdict of the jury was contrary to law in that the special damages awarded to plaintiff were neither pleaded nor proven.

5. That it was prejudicial error for the trial court to permit the foreman of the jury to *impeach* the verdict of the jury. (Italics ours.)

Summary of Argument.

The Champion Panel Raiser Head was manufactured by the appellant, Woodworkers Tool Works, Inc., an Illinois Corporation. It was sold to appellee's employer, Selby Company in Los Angeles, California, by appellant's agent, Woodworkers Supply Company and was delivered to the Selby Company directly from the appellant Company on October 25, 1948. The Woodworkers Supply Company sold the item to the Selby Company through the use of a catalogue issued to it by the appellant Company which catalogue bore the name of the appellant Company upon its cover. The Woodworkers Supply Company billed the Selby Company for the part. The appellants sales office was the Woodworkers Supply Company of which Elmer H. Preuer is the owner. Said Elmer H. Preuer was served with summons and complaint in this action as agent of appellant Company and, within the statutory period thereafter, the appellant Company appeared in the action.

The appellee, while working with the panel raiser head the day after it was installed, received serious injury to his right hand as a result of the panel head disintegrating, a piece of which struck appellee's hand. The panel head was properly installed upon the device which turned it for the purpose of beveling and cutting wood in making panels for doors. After appellee's injury an examination of the panel raiser head disclosed that it was defective in that it contained numerous blowholes, particularly at the point where it broke, that portion being extremely porous and

obviously unfit for the purpose for which the panel head was properly to be used. That the defective construction of the panel raiser head was the sole cause of its breaking and directly resulted in injuring the plaintiff.

The testimony at the trial disclosed that appellee had incurred approximately $350.00 to $400.00 in medical bills; that appellee, because of his injury lost approximately eight and one-half months employment amounting to $2176.00 based upon his earnings before his injury. That appellee was treated by three doctors, two of whom testified that appellee was permanently disabled.

The trial court, under the evidence as presented by appellee, was legally justified and was correct in denying appellant's motion to dismiss the action or in lieu thereof, to quash the return of service of summons, motion for a judgment of nonsuit, motion for a directed verdict, and motion for a judgment *non obstante veredicto.*

The trial court's instruction upon the doctrine of *res ipsa loquitur* was supported by the evidence and it would have been error for the court to have refused to give such an instruction to the jury under the facts as presented here. Finally, in granting appellee's motion to amend the verdict, the court merely corrected a clerical error in the filling out of the verdict by the foreman and, in doing so, the court did not err.

CONTENTION OF APPELLEE AND ARGUMENT.

I.

Appellant Was Served With Summons and Is Subject to Service of Process Within the Southern District of California.

> "Service of summons and complaint upon a foreign corporation must be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment *or by law* to receive service of process. . . ." (Rule 4d(3)(7) of the *Federal Rules of Civil Procedure.*) (Italics ours.)

Appellant admits that the summons and complaint in this action was served on Elmer Preuer. However, appellant contends that Elmer Preuer was not an agent of appellant Woodworkers Tool Works, Inc., nor was he served as their agent. (App. Op. Br. p. 14.)

In support of that contention, appellant filed two affidavits; that of E. H. Preuer [R. 9-10] and Robert W. Dunne [R. 10-11; App. Op. Br. pp. 7 and 8]. Neither affidavit sets forth any material facts to support this contention and are but legal conclusions of the affiants. In the words of the trial judge, they were "merely negative" [R. 501].

Appellee, in opposition to appellant's motion to quash the return of service of summons, filed the affidavits of William R. Walker and of Ray Taylor [R. 11, 15] which affidavits were referred to by the trial court as "positive"

[R. 501]. The affidavits of William R. Walker and Ray Taylor read as follows:

"State of California, County of Los Angeles—ss.

William R. Walker, being first duly sworn, deposes and says:

That during the month of October, 1948, and some time prior thereto, he was employed by the Selby Company and worked at said Selby Company in the capacity of manager;

That on or about October 23, 1948, affiant, in his capacity as manager of said Selby Company, determined that the said company was in urgent need of a Champion Panel Head, 1¼ bore, right hand, and that thereupon affiant telephoned the Woodworkers Supply Company and requested that they send a salesman to see him;

That thereafter a salesman from the Woodworkers Supply Company, whose name is Jack Townsend, visited affiant at the Selby Company's place of business, and brought with him a catalog upon which appeared the words 'Woodworkers Tool Works' and affiant ordered a panel head from said catalog and at said time was informed by said salesman, Jack Townsend, that the Champion panel head ordered was manufactured by the Woodworkers Tool Works, an Illinois corporation, and that he, as salesman for Woodworkers Supply Company, represented the Woodworkers Tool Works. At said time and place, affiant or his employer, Jim Selby, signed a purchase order to the Woodworkers Supply Company, and the Woodworkers Supply Company, thereupon ordered said panel head from the Woodworkers Tool Works, which was shipped direct to the Selby Company from the Woodworkers Tool Works by air express on October 23,

1948. That said Selby Company was billed by the Woodworkers Supply Company in the total amount of $83.61, said sum representing the purchase price of $75.00, $1.88 tax, and $6.73 representing two telephone calls to Woodworkers Tool Works from Woodworkers Supply Company.

That to affiant's own personal knowledge said Selby Company, through affiant, has ordered other products from Woodworkers Tool Works through the Woodworkers Supply Company.

WILLIAM R. WALKER.

Subscribed and sworn to before me this 15 day of March, 1949.

(Seal) RUTH D. FISHER,
Notary Public in and for said County and State."

"State of California, County of Los Angeles—ss.

Ray Taylor being first duly sworn deposes and says that he is employed by Pacific Employers Insurance Company of Los Angeles, California in the capacity of investigator. During the course of his employment, he had reason to investigate the circumstances surrounding the sale to the Selby Company by Woodworkers Tool Works of a Champion Panel Head 1¼ bore, right hand. That affiant visited the Selby Company, purchasers of the said panel head and also visited the Woodworkers Supply Company of Los Angeles, and there interviewed the employees of the supply company, and Mr. E. H. Preuer, owner of the Woodworkers Supply Company; that affiant was informed and his investigation revealed that the Selby Company, through their manager, William R. Walker, called the Woodworkers Supply Company

and asked that they send a representative to the Selby plant. That a representative by the name of Jack Townsend visited the Selby Company in response to the said request of William R. Walker, and there showed Mr. William R. Walker a catalog of the Wood Workers Tool Works, an Illinois corporation, and that Mr. Walker ordered the said panel head from the said catalog through Mr. Townsend. That a purchase order was signed by the Selby Company to the Woodworkers Supply Company, and an invoice was prepared by the Woodworkers Supply Company for the purchase of said panel head. That the said panel head was delivered air express by the Woodworkers Tool Works directly and that the Woodworkers Supply Company billed the Selby Company for said panel head directly. Said Invoice was sent to the Selby Company by the Woodworkers Supply Company, a copy of which is attached hereto and made a part of this affidavit. Affiant was informed by Mr. Preuer that Woodworkers Supply Company keeps in its place of business a catalogue of Woodworkers Tool Works and affiant saw the said catalogue; that on the face of the said catalogue are the words 'Woodworkers Tool Works' and their Chicago address; that affiant's investigation revealed that Woodworkers Supply Company represented Woodworkers Tool Works throughout this complete sales transaction, and that at no time did Selby Company directly contact Woodworkers Tool Works about the same; that all contacts were exclusively through the Woodworkers Supply Company.

RAY F. TAYLOR.

Subscribed and sworn to before me this 15 day of March, 1949.

RUTH D. FISHER,
Notary Public in and for said County and State."

After the trial court had denied the motion of appellant to dismiss this action, or, in lieu thereof, to quash the return of the service of summons [R. 21] appellant during the trial of this action, again attempted to establish that the party served with process was not an agent of the defendant corporation and that the defendant was not "doing business" in the State of California so as to be amenable to suit in the Southern District of California. The trial court admitted this evidence, though for another purpose [R. 276], and at one time commented that "there was no issue of jurisdiction here" [R. 250].

Following is a summary of that testimony:

Appellant's witness, Jerome B. Townsend testified that he was a salesman for the Woodworkers Supply Company [R. 249]. That he called upon the place of business of appellee's employer with a catalogue of the appellant, Woodworkers Tool Works, Inc., which catalogue bore on its cover the words "Woodworkers Tool Works Series K-1945" [R. 260-261]. The witness showed appellee's employer that catalogue and no other and further testified that he has sold others of these devices of the appellant company in California [R. 257-258].

It was testified by E. H. Preuer, president of the Woodworkers Supply Company that there are certain items of appellant company which are sold by him [R. 265]. *That he has a running course of business with the appellant company every year and sells some of its products at all times* [R. 267]. That he issues no catalogue of his own but constantly maintains a catalogue of appellant's company in his place of business and which is used by his

salesmen [R. 267-268] and, finally, that his company does the billing for the products it sells for the appellant [R. 266].

William Victor Knourek, vice-president in charge of production of the defendant company, Woodworkers Tool Works, Inc., testified that the panel heads manufactured by the defendant company are sold by that company throughout the United States and California [R. 294]; that these items are advertised in the defendant company's catalogue and in all the national woodworking magazines [R. 295] and that the defendant company issues and distributes their own catalogue bearing the name of the defendant on its cover [R. 295] and that the order for the particular panel head here in question was taken by Woodworkers Supply Company which, in turn, directed the defendant company to ship the item directly to plaintiff's employer [R. 295].

It is to be noted that the appellant was not registered in the State and, had not, at the time of the filing of this action, appointed an agent upon whom service could be made [R. 17].

The question then is:

(A) Was Elmer Preuer, of the Woodworkers Supply Company, an agent of the appellant company authorized by appointment or by law to receive service of summons within the meaning of the Federal Rules of Civil Procedure (*supra*)?

(B) Was the appellant corporation "doing business" in California so as to be subject to service of process within the Southern District of California?

A.

It is stated in the case of *Operative Plasterers & Cement Finishers International Association of the U. S. & Canada v. Case,* 93 F. 2d 56:

> "The rationale of all rules for service of process on Corporations is that service must be made on a representative so integrated with the corporation sued as to make it *a priori* supposable that he will realize his responsibilities and know what he should do with any legal papers served upon him."

Again in *Connecticut Mutual Life Ins. Co. v. Spratley,* 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, the court states:

> "The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority in him; and, if he be that kind of an agent, the implication will be made (of authority) notwithstanding a denial of authority on the part of the other officers of the corporation!"

California is in accord with the above principles. For example it is stated by the court in *Roehl v. Texas,* 107 Cal. App. 691 at page 704 (291 Pac. 255):

> "We hold the true rule to be * * * that every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made."

In *Milbank v. Standard Motors Construction Co.,* 22 Pac. 2d 271, 132 Cal. App. 67, it is stated (at p. 71):

> "The true rule is found in the case of *Connecticut Mutual Life Insurance Company v. Sprately* (*supra*), which reads as follows:
>
> " 'In such case it is not material that the officers of the company deny that the agent was expressly given such power (to accept service of process), or assert that it was withheld from him. The question turns upon the Character of the agent, whether he is such that the law will imply the power and impute the authority to him, and, if he be that kind of an agent, the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation.' "

In *Fort Wayne Corrugated Paper Company v. Anchor Hocking Glass Corp.,* 31 Fed. Supp. 403, we find the following comment:

> "A service of summons and complaint on a sales representative of a foreign corporation which was not registered in the state and which had not appointed an agent upon whom service could be made but which sold its products within the state through representatives who were paid on a commission basis and who maintained offices which were identified by the name of the corporation was a valid service upon that corporation."

Here the appellant was not registered in the State of California [R. 17] and the name of the appellant company and of the agent served are almost identical.

In the light of the evidence and the affidavits filed on behalf of the plaintiff, can it be said that, in the instant case, Elmer Preuer, President of the Woodworkers Supply

Company, was not such a representative of the appellant, and that the authority and responsibility of the person served was of sufficient character and rank that service of process upon him constituted service upon appellant; and that this responsibility and character was recognized by the person served and by appellant in responding thereto, answering and going to trial on the merits of plaintiff's case?

B.

The case of *International Harvester Company v. Kentucky,* 234 U. S. 579, is a leading case on the subject of what constitutes "doing business" for the purpose of service of process. In that case the foreign corporation had no headquarters or place of business in the state, there was merely a solicitation of orders and those who obtained the orders did nothing more than that, the orders obtained were subject to the approval of a general agent outside the state where the order was made; the agents made collections for the sale though they had no authority to compromise claims or to contract for the foreign corporation; and, finally, all deliveries were made directly from outside the state. The United States Supreme Court nevertheless held that the foreign corporation was "doing business" in Kentucky so as to subject itself to the jurisdiction of that state for the service of process:

The court said:

> "* * * Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. * * * The agents not

only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts * * * In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky." (P. 587.)

The *International Harvester Company* case has been followed in this and other states. In *Moore Machinery Co. v. Stewart-Warner Corporation,* 27 Fed. Supp. 526 at page 530 (Cal.), the Court, in concluding that the defendant there involved was doing business in California sufficient to sustain service of process, cited *International Harvester Co. (supra), Tauza v. Susquehanna Coal Co.,* 115 N. E. (N. Y.) 915, and *American Asphalt Roof Corporation v. Shankland,* 219 N. W. (Iowa) 28, and concluded with the statement that "California decisions are in line with the holdings of the cases just cited."

See *Milbank v. Standard Motor Construction Co.,* 132 Cal. App. 67, 70, 22 P. 2d 271.

See also:

West Publishing Co. v. Superior Court of State of Calif., 20 Cal. 2d 720, 128 Pac. 777; and

The Thew Shovel Co. v. Superior Court, 35 Cal. 2d 183, 95 P. 2d 149.

In the *Moore Machinery Co.* case (*supra*), the court made the following comment:

"The persistent effort of foreign Corporation to evade service of jurisdictional processes in the states has led some of the courts to suggest the application of a practical test, that where the defendant corporation's local activities justify it, the defendant be

drawn from its home state as in this case, upon the grounds of fairness: instead of sending plaintiff to Virginia or Illinois to try its case, bring defendant here."

In *Davis v. Motive Parts Corp.,* 16 F. 2d 148, the court states:

"I think that when a foreign corporation not only accepts orders, but fills the same and receives the pay therefore through the instrumentality of an agent located within this state it should for all reasonable and practicable purposes be said to have come here. To the extent of such activities it is doing all that it could do if it had here opened an office under its own name. The facts disclosed are sufficient to bring the case within the authority of International Harvester."

In accord:

Milbank v. Standard Motor Construction Co. (*supra*).

Very little more than solicitation of business has been held to be sufficient to constitute "doing business." It has even been suggested that solicitation alone should be enough of an activity to constitute doing business.

In the case of *Frene v. Louisville Cement Co.,* 134 F. 2d 511, annotated in 146 A. L. R. 926, the court said in this connection:

"But when jurisdiction has been extended to include some types of occasional acts and nearly all kinds of continuous operations, the rule which nullifies judicial power when a foreign corporation engages continuously and regularly in 'mere solicitation' is, to say the least, anomalous. Solicitation plus main-

taining an office is sufficient, solicitation plus maintaining a warehouse likewise sustains jurisdiction. Solicitation plus making deliveries, collections and handling claims, has like effect. Solicitation without these additional activities, or any of them, may be more sustained, more insistent, more productive of business than it is with them, solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. * * *

"It would seem therefore, that the mere solicitation rule should be abandoned when the soliciting activity is a regular continuous and sustained course of business, as it is in this case. It constitutes, in the practical sense, both 'doing business' and 'transacting business' and should do so in the legal sense. Although the rule has not been clearly and expressly repudiated by the Supreme Court, its integrity has been much impaired by the decisions which sustain jurisdiction when very little more than 'mere solicitation' is done."

When the corporation's activities are continuous and the cause of action arises out of those activities, its presence in the state can hardly be denied.

In *International Shoe Co. v. Washington,* 326 U. S. 310, 90 L. Ed. 94, the court states:

"Presence in the state in this sense has never been doubted when the activities of the corporation here have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given."

Here there was nothing irregular or casual about the activities of appellant within the state, but, on the contrary, they were continuous and resulted in a certain volume of business to the appellant. This fact was admitted by Elmer H. Preuer. He testified as follows at page 265 of the Transcript of Record:

> "Q. What relationship do you have with the Woodworkers Tool Works of Chicago? A. We buy and sell machinery and supplies, and in our course of business there are certain items that are manufactured by the Woodworkers Tool Works which we sell on a commission basis."

And at page 267:

> "Q. Mr. Preuer, how often during a given year of business would you say you sell Woodworkers Tool Works products? A. Well, that is rather irregular. In other words, we may have a half dozen invoices, and none the next.
>
> Q. *But do you have a running course of business with them every year?* A. *That is right.*
>
> Q. You are involved in transactions in which the Woodworkers Tool Works sell products *at all times,* that is, you handle it? A. Not all of their products.
>
> Q. I say some. A. *Some items, yes.*" (Italics ours.)

Here the local agent of appellant, Woodworkers Tool Works, Inc., which did business under an almost identical name as appellant company (Woodworkers Supply Company), solicited the sale of the item in question with the use of a catalogue supplied them by appellant and which bore on its cover the name of appellant company [R. 260, 261].

It is to be noted, also, that the local concern Woodworkers Supply Company did not issue a catalogue of its own.

In that connection we quote further from the testimony of Elmer H. Preuer in answer to questions asked him by the trial court [R. 268]:

"The Court: If a customer asks for one of their (the appellant's) tools, you or the salesman will refer to the catalogue?

The Witness: That is correct.

The Court: So you identify the tool you want?

Witness: Yes.

The Court: You heard your salesman Mr. Townsend testify this morning?

Witness: Yes.

Court: He took the catalogue with him?

Witness: Yes.

Court: He had the catalogue when they gave the order?

Witness: Yes.

Court: That catalogue is made by them?

Witness: Yes.

Court: By the concern?

Witness: Yes.

Court: They turn it over to you for taking orders?

Witness: Yes.

Court: *You do not put out your own catalogue?*

Witness: *No.*

The Court: All right." (Italics ours.)

In view of the preceding, it is apparent that the trial court accorded the appellant full opportunity to present evidence on the issue of jurisdiction and accepted a voluminous amount of evidence on the matter.

The appellee is entitled to the presumption of the validity of the trial court's determination and it should not be disturbed if there is any substantial evidence to support it.

Lumas Film Corp. v. Superior Court, 89 Cal. App. 384, 264 Pac. 792;

Holland v. Superior Court, 121 Cal. App. 523, 9 P. 2d 531.

It is submitted, therefore, that the authority and responsibilities of the person served here show that he is of sufficient character and rank that service of process upon him constituted service upon the appellant. That appellant's position that it can be sued only in Illinois is unsound; particularly when, as here, it is doing a large volume of California business in the manner above outlined, and the suit is with respect to that business, and service is made on the agent through whom appellant does a large part of that business and who was the medium through which the item in question in this suit was sold by appellant.

It is further submitted that appellant Company was properly served with summons in this action and was clearly doing business in such a manner as to subject itself to the jurisdiction of the courts of the Southern District of California.

II.

A. The Verdict of the Jury and the Judgment in Favor of the Appellee Are Amply Supported by the Evidence; and,

B. The Evidence Proves a Direct Causal Connection Between the Breaking of the Panel Raiser Head and the Injury Sustained by Appellee.

A.

No citation of authority is necessary to support the familiar rule of law that if there is any evidence, or if there is any reasonable inferences which may be drawn from the evidence, to sustain a verdict of the jury, then the appellate court is bound to affirm the judgment of the lower court entered upon such verdict.

Appellant seeks to impose the duty upon appellee of showing or "tending to show" that the appellant had the duty to do something more than make inspections they contend were made by them (App. Op. Br. p. 22).

Though the physical evidence in the case in the form of the broken panel head itself [Pltfs. Ex. 2] is compelling evidence that no such inspections were made by appellant, nevertheless appellee was under no obligation to show what appellant's duty was.

However, in view of the inherent danger of this instrumentality when considered in the light of the use to which it properly was to be put, plaintiff did introduce evidence of further tests which were available to defendant to insure the safety of its products.

This same contention of appellant was raised by the manufacturers and rejected in the case of *Sheward, et al. v. Virtue, et al.,* 20 Cal. 2d 410, 126 P. 2d 345.

In that case the Supreme Court stated at page 413:

> "Virtue Brothers further contend that a determination of the question whether they were negligent must be resolved by evidence of tests of discovering defects made by other manufacturers of similar articles. They argue that they should not have been required to make tests which were not customarily made by other manufacturers; that in the absence of evidence of what other manufacturers did to discover defects and that these appellants did not apply such tests, they may not be found guilty of negligence. Evidence of that character was not introduced at the trial of this case. In fact evidence was that no tests or special examinations for fractures were made by Virtue Brothers. Assuming that other manufacturers likewise made no special examination to discover fractures, such a custom would not excuse the failure of these appellants."

A somewhat similar contention was rejected in the case of *Hughes v. Warman Steel Casting Co.,* 174 Cal. 556, 163 Pac. 885. In *Robinet v. Hawks,* 200 Cal. 265, 274, 252 Pac. 1045, this court said that the doctrine of customary usage does not apply to the question of legal duty under the law of negligence, or that the continuance of a careless performance of a duty would transform a party's negligence into due care, and in the middle of page 414 the court continues:

> "The appropriate standard of care applicable to the facts of the present case is expressed in *O'Rourke v. Day and Night Water Heater Co., Ltd.,* 31 Cal. App. 2d 364, 88 P. 2d 191, to the effect that if the defective condition of the part could have been disclosed by reasonable inspection and tests, and such inspection *and tests* had been omitted, the defendant has been negligent." (Italics ours.)

In *Smith v. Peerless Glass Co.,* 259 N. Y. 292 (181 N. E. 576), it was held that reasonable care consisted of making the inspections and tests during the course of manufacture and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article. * * * But if, as stated, the evidence justifies the jury's finding that the defendants omitted to apply any standard of reasonable inspection or other simple test which would have revealed the defect, and that the omission constituted negligence, the negligence would not be excused because other manufacturers did not make such tests.

It is to be noticed here, that all of the decisions in these cases refer to *tests.* At most defendant attempted to establish that "inspections" were made during the course of their manufacture of the panel raiser head, but nowhere is there any evidence in the record that any *tests* were made to insure the safety of the product except the test made by witness Missner [R. 358-9] which test was made after this action was filed by plaintiff and just before his deposition was to be taken! [R. 383.]

The appellant states in its opening brief:

> "While the appellant *may* have had a duty to make an inspection of the panel raiser head it is not responsible for defects that cannot be found by a reasonable, practicable inspection" (App. Op. Br. p. 23). (Italics ours.)

In making this qualified commitment the appellant quotes from *Honea v. City Dairy, Inc.,* 22 Cal. 2d 614, 140 P. 2d 369, which, because it involved a latent defect, is not applicable to the instant case but tends only to qualify this sole concession in appellant's brief.

Assuming then, that it is agreed the appellant was under a duty to make an inspection of the panel head, is there any evidence in the entire record which would entitle appellant to represent that the defect here was a latent one and that there was no feasible means of discovering the defect or flaw available to the appellant? (App. Op. Br. p. 23.)

Appellee produced the only expert witness who testified at the trial: Gough L. Cheney. Mr. Cheney is a chemist and engineer of forty years' experience who has been employed by a reputable chemical and engineering company for thirty-five years. Mr. Cheney made a careful examination of the panel raiser head after it disintegrated [R. 172-173-174].

As to whether there was a feasible means of discovering the defect available to appellant, Mr. Cheney gave the following testimony:

At page 178 of the Transcript of Record:

> "Q. I will ask you if, on the basis of your examination, you found any structural defects on this arm, this panel raiser head? A. Yes.
>
> Q. Describe them. A. The defects which I could see after the arm broke on the upper member, there were a series of shrinkage cracks or blowholes or imperfections in the metal. Those apparently reached the inner surface of the arm, *so that they were visible from the exterior surface.* There are also some minor porosities visible on the machined surface of the upper arm. Those are the most outstanding things that can be seen on the arm.

The Court: That conclusion you arrived at from the visual examination?

The Witness: Visual examination plus microscopic examination of specimens obtained from the other fractured surface of the arm."

At page 182:

"The Court: Is that porosity noticeable on any other portion of the structure, except the broken place?

The Witness: The greatest amount is in the vicinity of this fractured surface. There are also others to a lesser extent, which are visible on the bent arm. Even on the machined upper surface you can see where the small blow holes or pockets existed in the metal. The other arm seems to be quite sound, so far as the visual inspection goes."

Then at page 188:

"Q. Now, where did you find the weakest point of this panel raiser head arm to be? A. Mechanically the point that would take the greatest load is right where it broke.

Q. Where it broke. What point, if any, on the portion of where it broke would take the greatest stress? A. Approximately at the fractured surface, that is the greatest leverage.

Q. Where the blow-hole is? A. Yes sir.

Q. Did you measure the depth of the blow-hole? A. No. It is about half an inch deep.

Q. In answer to some of the questions by the court I think maybe you answered this, but I want to ask it again: In your opinion were those blow-holes and the excessive porosity in that cast steel discernible to the naked eye before the arm broke? A. *Yes,*

I think fairly careful inspection would have shown them.

Q. And not even necessarily tests? A. *Yes, I think those cavities in the broken arm could have been seen.*

Q. *With the naked eye?* A. *Yes.*

Q. *Without a microscope?* A. *Yes.*

Q. Was that casting painted after it was milled? A. It was painted. I don't know when.

Q. It couldn't be painted and then milled? It is painted, is it not? A. It is painted.

Q. In your opinion were the blow-holes and excess porosity in that arm more discernible or less discernible after it was painted or before it was painted? A. The paint filled up some of the porosity.

Q. *In other words, while it was being machined and not painted the blow-holes would be more apparent to the naked eye than they are now?* A. *In my opinion.*

Mr. Callaway: That is argumentative.

Q. (By Mr. Olson): I am just asking is that a fact? A. *Yes, I think they would be more apparent.*

Q. Would you point out to the jury where those blow-holes and where that porosity is apparent to the naked eye? A. Well, examination of this broken arm in the vicinity of the fractured face, you can see these blow-holes are where they come to the surface on the innerside. There are none apparent on the outer side. But then over on the arm, over here (indicating), that is bent. You can see them on the machined surface as well as down here in this bend (indicating)." (Italics ours.)

Appellants witness William Victor Knourek, vice-president in charge of production of appellant company had this to say regarding the question raised by appellant as to whether there was a feasible means of discovering the defect or flaw available to the appellant. (It is recalled that Mr. Knourek's testimony was taken by deposition. His testimony was read by Mr. Callaway and the questions put to him were read by Mr. Olson) [R. 304]:

"Mr. Olson: Now, what would the inspection or tests that are ordinarily made reveal, of the castings, I mean?

Mr. Callaway: *If the casting is defective we can see it immediately, when it comes in its rough state;* and if there are any defects we can also tell later, when we start making cuts on the casting.

Mr. Olson: By cuts you mean machining?

Mr. Callaway: Machining; yes, sir.

Mr. Olson: And the machining is done to smooth the casting up, is it?

Mr. Callaway: That is right.

Mr. Olson: And you can tell by your inspection and your tests whether it is a sound casting; is that correct?

Mr. Callaway: Most of the time we can."

Then on page 306:

"Mr. Olson: Then what could be seen by your inspection, in the way of defects?

Mr. Callaway: Well, a crack in the casting.

Mr. Olson: Porosity?

Mr. Callaway: Porosity.

Mr. Olson: Blow-holes?

Mr. Callaway: Blow-holes."

And, at page 317:

"Mr. Olson: Now a small blow-hole might not have any effect on the casting at all, is that right?

Mr. Callaway: That is right.

Mr. Olson: But a large blow-hole might have a serious effect and might cause a grave structural defect?

Mr. Callaway: Yes.

Mr. Olson: And it would depend on the size of the blow-hole as to whether it constituted a structural defect, or not?

Mr. Callaway: *But a blow-hole that large would be detected in the machining of the casting.*"

At page 321 (here Mr. Lopardo of appellant council is asking the questions of Mr. Knourek and his answers are being read by Mr. Callaway):

"Mr. Lopardo: What I mean is, do you have standing instruction to all your working force what they are to look for in the process?

Mr. Callaway: That is right.

Mr. Lopardo: What are they to look for?

Mr. Callaway: Well, they are to look for flaws in the castings, upon machining the casting; if they hit any blow-holes they are supposed to scrap the casting immediately. And then, the most important thing is size: or one of the important things is size, such as the hole diameter, and other different measurements of the tool."

Mr. Charles E. Meissner, plant superintendent of appellant company on the same question, testified as follows. (Mr. Meissner's testimony was in the form of a deposition

and the reading of it was handled at the trial in the same manner as was the testimony of Mr. Knourek, *supra.*)

At page 340 of the transcript of record (the witness is explaining the various processes in the manufacturing of the panel raiser head):

"Mr. Lopardo: So the roughness is removed?

Mr. Callaway: The roughness is removed; and in doing so he would notice any imperfections that might be in that casting."

At page 344:

"Mr. Lopard: And at that time is there any inspection made?

Mr. Callaway: Well, *he would see any noticeable defects* as he is machining off this rough surface."

At page 400:

"Mr. Olson: Are blow-holes easily discovered in steel such as this?

Mr. Callaway: I would say you could see them, if they were there.

Mr. Olson: That is, they would be visible on inspection to the naked eye?

Mr. Callaway: If they were there.

Mr. Olson: Without a microscope?

Mr. Callaway: That is right.

Mr. Olson: You wouldn't even need glasses, if you had ordinary eyesight?

Mr. Callaway: That is right."

At page 421:

"Mr. Olson: Did you make any test for hidden blow-holes?

Mr. Callaway: I said yes.

Mr. Olson: What was that test?

Mr. Callaway: Well—.

Mr. Olson: Go ahead, please.

Mr. Callaway: While it was machined.

Mr. Olson: All right, what was the test?

Mr. Callaway: *Well, when a man is machining he can tell if he runs through a blow-hole or not.*" (Italics ours.)

It is submitted that the foregoing is conclusive proof that we are not dealing here with a situation where the defect was a latent one as appellant would have it considered. That here is proof positive that inspection of the panel raiser head would have made its defect known to even the most casual inspector. Porosity, cavities, blow-holes and segregation are obvious to the naked eye. Accordingly the cases cited by appellant in support of this contention are not in point. All four cases cited in appellant's opening brief (p. 23) deal with defects which were latent, and where the defect, if any, could not be discovered by reasonably careful inspection.

The court will note, from the record that the defective panel raiser head which broke in this case causing the plaintiff's injuries was in the courtroom at the time of the trial and was introduced into the evidence as Plaintiff's Exhibits 2, 2-A, 2-B, 2-C and 2-D [R. 97]. Thus the jury had before it the portion of the panel raiser head which broke and was in a position to ascertain for itself from the excessive porosity, blow-holes and segregation which was evident to the naked eye of each juror the cause of its breaking. It was able to judge for itself whether the condition of the panel raiser head was such that the appellants, in the exercise of ordinary care,

should have discovered the defects in the course of the many inspections of the casting which they claim to have made.

We see then, from the record, that, in reality, the evidence established that the defective condition which existed at the time that the panel raiser head was in the hands of the appellant was one which was visible to the naked eye. The jury was entirely justified in concluding that such was the fact and that the appellants were negligent in failing to discover and provide against the defect which caused the injuries to appellant.

Appellant quotes extensively from the case of *Honea v. City Diary, Inc. (supra),* in support of their contention and the following excerpt from that case is found on page 24 of appellant's brief:

> "The limit of its (the manufacturer) duty was to provide against defect discernible upon reasonable inspection. * * *"

Assuming that this may be considered an admission by appellant that it was under the same duty, it is submitted that the evidence clearly proves that the jury was justified in finding that that duty was not performed by appellant.

The case of *Sheward v. Virtue,* 20 Cal. 2d 410, 126 P. 2d 345, is one particularly in point with the present case.

It is stated by the court in that case at page 413:

> "The evidence is sufficient, however, to support the implied finding of the jury that the defect existed when the casting was in the possession of the manufacturer and while it was being handled by its employees in the necessary processes before it became a part of a completed chair; that the defect was discernible if a careful visual examination for fractures

was made, that the manufacturer was negligent in failing to make such an examination and that its negligence was the proximate cause of the plaintiff's injuries."

In affirming judgment for the plaintiff in that case the court found the evidence justified the verdict although the defect complained of there was not nearly as apparent as are the defects in the instant case.

B.

Appellee is in complete agreement with appellant when it states:

> "The question of casual connection should not be left to the guess, conjecture or surmise of the jury." (App. Op. Br. p. 30.)

However as stated in the memorandum opinion of the trial judge in *McKellar v. Pendergast,* 68 Cal. App. 2d 485, quoted by appellant in its opening brief (p. 30):

> "A Plaintiff is not bound to negative every other conceivable theory or hypothesis which ingenuity may invent to account for his injury."

It is submitted that appellant here is demanding that appellee do just that.

> "There is a clear distinction between casual connection and proximate cause. Casual connection may appear, though the negligent act be the remote and not the proximate cause."
>
> *Alabama Power Co. v. Bass,* 119 So. 625, 628, 218 Ala. 586, 63 A. L. R. 1;
>
> *Words and Phrases,* Vol. 6, p. 320.

The evidence here clearly proves that there was but one possible cause of plaintiff's injury; the distintegration of the panel raiser head a part of which struck plaintiff's hand before he was able to remove it from the level of the Shaper upon which he was working. Where, in the entire transcript of the proceedings, is there any evidence upon which the existence of any other cause can be premised?

In *San Joaquin Grocery Co. v. Trewhitt,* 80 Cal. App. 371, 252 Pac. 332, quoted by appellant (App. Op. Br. p. 30), which was an action to recover damages caused by water alleged to have drained into the basement of plaintiff's store from the adjoining property, the facts revealed, as stated in the court's opinion:

> "there were the possibilities that the water which was afterward found in the plaintiff's basement was (1) rain-water; (2) water used for settling soil by the defendants as independent contractors; (3) water escaped from the three-quarter inch hose used by the masons (not the defendants), and (4) waters coming from other sources." (At p. 375.)

The court concluded (p. 376):

> "So in this case the jury were left to merely guess where the waters found in plaintiff's basement had come from—whether said waters were those in division (1), (2), (3), or (4), as hereinafter indicated."

What other cause would the appellant have us believe was the reason for plaintiff's injury here? Appellant quotes at length from the testimony of the plaintiff (App. Op. Br. pp. 25 through 30). Where, in that testimony, does there appear any cause other than the distintegration of the panel head which might account for plaintiff's injury? There is none.

It was established that just before the injury to plaintiff the panel raiser head was revolving at 7200 revolutions per minute [R. 115]. It would obviously have been impossible for plaintiff to have seen what struck his hand even if he had not "ducked under the table" as he testified.

It was established that plaintiff never had an injury to his right hand before the accident [R. 169] and finally that plaintiff's right hand was not cut ten seconds before the part disintegrated, but was cut as it did so [R. 1720].

In *McKellar v. Pendergast, supra,* the source of the substance on the floor (upon which plaintiff slipped and fell) was unknown. In the instant case the only single cause of the injury to plaintiff was not only known but proved.

It is therefore submitted that there is no merit whatsoever to this contention of appellant that the plaintiff failed to establish any causal connection between the breaking of the panel raiser head and the injury sustained by plaintiff. That the negligence of the appellant company in manufacturing an obviously defective part which was inherently dangerous was sufficient to establish the chain of causation from which the jury had no alternative but to find that the plaintiff's injury was the result of the sudden disintegration and breaking apart of the Panel Raiser Head here in question.

See:

McGee v. Fasulis, 57 Cal. App. 2d 275.

It is assumed that there is no necessity to do more in answer to subdivisions 1 and 2, paragraph II of appellant's opening brief (p. 8), referring to appellant's motion for nonsuit on the grounds that the appellant did not manufacture the panel raiser head or sell it to appellee's employer, in view of the following facts:

In appellant's "statement of the case" on page 5 the following statement is found:

> "The Champion panel raiser head in question was manufactured by the defendant Woodworkers Tool Works, Inc., an Illinois corporation, located at 222 South Jefferson Street, Chicago, Illinois."

In appellant's "Summary of Argument" on page 11, the following statement appears:

> "The Champion panel raiser head, * * * was manufactured by the appellant Woodworkers Tool Works Inc., an Illinois Corporation."

The answer of appellant to plaintiff's second amended complaint in paragraph I(D) thereof contains the following:

> "Answering the incorporated paragraph V defendant admits that it sells Champion panel raiser heads; that it partially manufactured said article, * * *"

The transcript of record is replete with evidence that the defendant manufactured the item in question [R. 285-6; 338-9].

The transcript of record also contains adequate proof that the appellant company sold the panel raiser head to defendant's employer through the agency of the Woodworks Supply Co. [R. 260-261, 266-267, 285, 338-339].

III.

The Trial Court Committed No Prejudicial Error in Instructing the Jury on the Doctrine of Res Ipsa Loquitur.

1. The Facts of This Case Entitled the Plaintiff to an Instruction to the Jury Given by the Court on the Doctrine of Res Ipsa Loquitur.

Appellant's contention that the plaintiff was not entitled to an instruction to the jury on the doctrine of *res ipsa loquitur* is; in brief, that in order for this doctrine to be applicable to a given case the defendant must have had, among other things, exclusive control of the instrumentality at the time of the event leading to the injury to the plaintiff.

Appellant further argues that the doctrine should not be held to be applicable in the instant case on the theory that the injury could have been caused by a number of speculative ways other than by the disintegration of the panel head causing a piece of it to strike plaintiff's hand. (App. Op. Br. pp. 32-33.)

In reply to the speculative explanations for the accident which are advanced by appellant it is submitted that the undisputed evidence proved that the panel head was properly installed [R. 111-115, 185]. There is no evidence that the blades of the panel head had received a blow of any kind before the part disintegrated. Mr. Cheney testified as follows on that question:

> "Q. Did you find any evidence that the part that broke, the arm that broke, the blade that broke, had struck any object before it broke? A. *I don't see any evidence, in my opinion.* There are a few little marks on it. They don't appear to me to have been

there before this thing was flying around and hitting all kinds of things.

Q. Is this the blade from the broken part (indicating)? A. It is.

Q. Did you find any marks on it, to indicate it had struck any object of any kind, a spike, or anything? A. Yes, there are a few little marks on the cutter blade, but quite small. Under the microscope they seemed to have, in my opinion, to have come from the back side, rather than the front side.

Q. Which would have occurred when? A. Probably after it was broke and flying around and hitting all this other metal." (Italics ours.)

It might be added here that Doctor Detwiler testified as follows when questioned by the court as to what had struck plaintiff's hand causing his injury [at page 241 of the Transcript of Record]:

"The Court: In this case you think the metal caused it? A. Yes, *I don't think there is any question in this case.*

The Court: All right, the reason I am asking is because the plaintiff himself could not tell what actually caused it, what his hand came in contact with that caused the injury, that is the reason I am asking you if you can make any deductions from the way it looked.

The Witness: *We felt there was no question it was a metallic instrument that had caused this.*

Q. (By Mr. Olson): From your observance of the wound when Mr. Byrne came in, would it be a forceful impact? A. Yes.

Q. Because of the shattering of the bone? A. Yes.

Q. Because of the breaking of the bone? A. Yes, and maceration of the tissue.

Q. What do you mean? A. Well, very vulgarly to describe it, chewed up, hamburger." (Italics ours.)

Appellee's counsel seeks to avoid the doctrine of *Res Ipsa Loquitur* as clearly stated by the Supreme Court of California in the case of *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436, by gratuitously stating that the application of the decision of the court in that case was intended to apply only in cases involving containers of carbonated beverages. The answer to that contention is that the decision in that case not only does not so confine its application but clearly makes its ruling of general application.

A review of California decisions long before and those decisions rendered after the *Escola* case *(supra)* discloses that the rule of *Res Ipsa Loquitur* has consistently been liberally applied by California courts and in a multitude of different factual situations.

The court states in the *Escola* case (*supra*):

"Many authorities state that the happening of the accident does not speak for itself where it took place sometime after defendant had relinquished control of the instrumentality causing the injury. *Under the more logical view,* however, *the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident,* provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession." Citing cases collected in *Honea v. City Dairy, Inc.* (*supra*). (Italics ours.)

Where in this decision by the Supreme Court of California does appellant find any indication that the decision was intended to apply only in cases involving containers of carbonated beverages? To the contrary the *Escola* case (*supra*) is referred to with approval in the more recent decision in *Ybarra v. Spangard,* 25 Cal. 2d 486, where the court approved the doctrine of *Res Ipsa Loquitur* in the case of an injury resulting from medical treatment.

In the *Ybarra* case *(supra)* the court makes the following comment:

> "An examination of the recent cases, *Particularly in this state,* discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of *res ipsa loquitur* would otherwise be defeated. Thus the test has become one of right of control rather than actual control." (Italics ours.)

The case of *Metz v. Southern Pac. Co.,* 51 Cal. App. 2d 260, 124 P. 2d 670, decided before the *Escola* case *(supra)* is one particularly in point with the instant case. There the plaintiff's husband was killed as a result of an accident which occurred when a light motor car in which he was riding overturned due to a structural defect. The court approved the giving of an instruction of the doctrine of *res ipsa loquitur* even though the deceased person was in actual control and operation of the motor car at the time of the accident.

The court stated (at p. 268):

> "The requirement that the instrumentality must be under the management and control of the defendant, in the application of the doctrine of *res ipsa loquitur, does not mean, nor is it limited to actual*

physical control. It has been held to apply to the mere right of control of the instrument which causes the injury at the time of the accident." (Citing cases.) (Italics ours.)

In *Van Horn v. Pacific Refining Etc. Co.,* 27 Cal. App. 105, 148, Pac. 951, cited by the court in *Metz v. Southern Pac., supra,* is, it is submitted, another case directly in point with the present one. That case was decided in 1915, long prior to the *Escola* decision. It involved an injury which occurred as a result of the blowing off of a cap of a steampipe while the plaintiff was bending over the same during the course of his work. It is also to be noted that the particular steampipe had been installed by the defendant *three days* before the accident. In holding that the case was one to which the doctrine of *res ipsa loquitur* may be fairly and properly applied the court made the following comment (at p. 108):

"There are only three possible ways by which its (the cap) disclocation could be explained: either it was defectively constructed; or negligently and insufficiently affixed to the pipe; or else it had been tampered with and loosened to the point of danger under pressure by some one other than the defendant's employees. In either of the first two of these possibilities the defendant would be liable. But the appellant contends that because the third possibility exists the doctrine of *res ipsa loquitur* can not be given application. In support of this contention counsel for the appellant argues that the mere fact that persons other than the defendant or its em-

ployees were working in and about the building and had access to the particular floor where this steam-pipe was located, would be sufficient to prevent the application of the rule, because some one or other of these might possibly have so struck or tampered with this pipe as to have caused the loosening of its cap to such an extent that it would be liable to blow off at any moment under pressure.

"We think this argument, unsustained as it is by any semblance of evidence or proof tending to show such interference with this pipe or cap, carries the possibilities in cases of this kind too far. To give it application would be to practically eliminate the doctrine of *res ipsa loquitur* from the law * * *

"The rule declared in this and the other cases cited by appellant to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant must be taken to refer to the right of such control; otherwise, as we have seen, the doctrine of *res ipsa loquitur* could seldom if ever be given application."

In *Rafter v. Dubrock's Riding Academy,* 75 Cal. App. 2d 621, 171 P. 2d 459, a case involving an injury which resulted from the slipping of a saddle on a horse, the same objection regarding the necessity of control being present in the defendant was made. In approving the application of the doctrine of *res ipsa loquitur* the court stated (at p. 626):

"Since the defendant corporation was not present by any of its officers when the ride took place, or

when the saddle broke or slipped the only control which may be attributed to it might be called "constructive control."

See also:

McComas v. Al G. Barnes, 215 Cal. 685, 12 P. 2d 630;

Helms v. Pacific Gas & Electric, 21 Cal. App. 2d 711, 70 P. 2d 247;

Lejeune v. General Petroleum Corporation, 128 Cal. App. 404, 18 P. 2d 429.

In the instant case it is undisputed that the defendant corporation had exclusive control of the panel raiser head at the time of the alleged negligent act, that the sudden disintegration of the head would not have ordinarily occurred in the absence of negligence on the part of the defendant, and that there was no evidence of interference with or improper installation of the panel head.

It is therefore submitted that the doctrine of *res psa loquitur* was properly applicable and no error was committed in the trial court instructing the jury on that doctrine.

It is further submitted that, without the application of the doctrine of *res ipsa loquitur,* the evidence adequately supports the verdict of the jury. That appellant's negligence as charged in the complaint was the sole and proximate cause of the injuries which were suffered by appellee.

IV.

The Special Damages Awarded to Plaintiff Were Pled and Proved by Plaintiff.

At the conclusion of the trial the court gave the jury an instruction upon Special Damages. That instruction *which was not objected to by appellant at any time* read in part as follows:

> "You are instructed that special damages as distinguished from general damages are those which are natural but not necessary consequences of a negligent act. They are such as will compensate plaintiff for the reasonable value, not exceeding cost to plaintiff, of the examinations, attention, care by physicians and surgeons, reasonably required and actually given in the treatment of plaintiff, and reasonably certain to be required to be given in his future treatment, * * * hospital accommodations * * * and reasonably certain to be required and given in his future treatment, if any, and finally, the special damages are such as will compenate plaintiff for the reasonable value of the time lost, if any, by plaintiff since his injury wherein he has been unable to pursue his occupation, * * * In determining this amount, you should consider such plaintiff's earning capacity, * * * and further consider the evidence as to the probability and possibility of plaintiff pursuing his occupation or any other occupation in the future." [R. 448-449.]

Plaintiff's Second Amended Complaint pleads as special damages that plaintiff since said accident has been totally

disabled from pursuing his usual occupation and has been under the care of physicians for said injuries and has incurred medical expenses in the sum of two hundred and fifty dollars and that further medical expenses are being incurred by plaintiff.

The plaintiff testified that he owed "between $350.00 and $400.00 in medical bills incurred on account of his said injuries [R. 202]. That as a result of his injury he was unemployed from the date of the accident, October 28, 1948, until January 10, 1949, a period of approximately two and one-half months, that he was laid off from work in the first week of February, 1949, and was not employed until July of 1949, a period of approximately six months [R. 149-150]; a total therefore of eight and one-half months of loss of earnings was proved. The plaintiff further testified that he earned approximately $64.00 per week or $256.00 per month [R. 137]. A loss of earnings therefore of $2176.00, in addition to his medical costs.

It was testified by two of the doctors who treated plaintiff that plaintiff's injury requires future surgery [R. 212, 238]. That such operation would require a week's hospitalization and would cost approximately $300.00 to $500.00 [R. 215].

In view of the instruction of the court on the subject of special damages and the above referred to pleadings and proof it is submitted that the amount awarded plaintiff for special damages was fully justified and that the said special damages were pleaded and proved by plaintiff.

Appellant in his Memorandum of Points and Authorities in Support of Motion for Judgment *Non Obstante Veredicto* or for a New Trial [R. 57] has this to say regarding plaintiff's special damages (at p. 58):

> "In recapitulation, therefore, plaintiff's special damages could not possibly be more than $400.00 for medical expenses and $1024.00 for loss of earnings, or a total of $1424.00."

With this admission by appellant, in view of the fact that the special damages awarded plaintiff was in the amount of only $1000.00, appellant's contention that appellee did not plead and prove the special damages awarded appellee lacks consistency as well as support by the rest of the record.

Appellant quotes from *California Jury Instructions,* published by West Publishing Company (App. Op. Br. p. 34), and indicates his approval of this publication. It is therefore to be noted that Number 174-F thereof, on the subject of special damages, includes the following element:

> "The reasonable value of the time lost, if any, by said plaintiff since his injury wherein he has been unable to pursue his occupation. In determining this amount, you should consider evidence of said plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned in the time lost had he not been disabled."

V.

The Foreman of the Jury Did Not Impeach the Verdict of the Jury. The Verdict and Judgment as Originally Entered Was the Result of a Clerical Error and Was Properly Corrected by the Trial Court.

Though, as appellant states (App. Op. Br. p. 38), the affidavit of the foreman of the jury George F. Caldwell was signed by affiant sixteen days after the verdict was rendered, it is to be noted that the affidavit states that the affiant realized that he had made a clerical error "fifteen minutes after said verdict was returned and the jury was discharged" [R. 64].

The appellant would have it believed that the trial court in correcting the verdict in accordance with the obvious intention of the jury committed "grave prejudicial error." Such a view is not supported by the cases cited by appellant or any authority that we have been able to find.

Without exception, the cases cited by appellant (App. Op. Br. p. 37) involve instances where the jury by affidavit or otherwise attempted to impeach their verdict or explain the circumstances under which their decision was made.

It is to be recalled that the jury did not arrive at its verdict until 1:45 A. M., Tuesday, February 21, 1950, after having deliberated for a period in excess of twelve hours [R. 456, 485].

That a verdict was arrived at ten minutes before the jury was to again report to the court upon their deliberations [R. 64].

Under such circumstances a clerical error in the filling in and signing of the verdict unanimously agreed to by the jury certainly is not surprising.

The affidavit of George F. Caldwell, foreman of the jury [R. 63-64], is consistent with the evidence, and the circumstances surrounding his erroneously filling in the amount of general damages awarded and the special damages awarded in the wrong spaces in the prepared form of verdict.

The law clearly recognizes the power of a trial court to amend a jury verdict which is obviously the result of inadvertence and does not reflect the intention of the jury and which verdict is not even consistent with the evidence.

Here the affidavit was offered not for the impeachment of the verdict, but rather to make a clerical correction.

The case of *Freid v. McGrath,* 135 F. 2d 833 (1943), is a Federal court decision particularly in point with the question here involved. There the jury returned a verdict in favor of the plaintiff for $425.00. *Which verdict the jury expressly confirmed after the verdict was read in open court.* Upon affidavits of several of the jurors it was obvious that the jury intended to return a verdict which would result in plaintiff being entitled to the sum of $850.00 instead of $425.00.

The Court of Appeal held that:

> "If the jury actually found a verdict in the amount of $850.00 but *mistakenly* apportioned that amount between two defendants, the District Court *if properly convinced of that fact,* would have power to correct the verdict accordingly: so that it would express the conclusion actually reached, and finally agreed upon by the jury—*but mistakenly reported to the court.*" (Italics ours.)

The court in its opinion made the following comment:

> "If any question remains as to what constitutes the true verdict of the jury, it must be decided by the District Court, in the proper exercise of its discretion, using such information as may be available to it. * * * Where the jury's error is patent on the face of the verdict, the court should so amend the verdict as to make it conform to correct legal principles. *But where the mistake is latent in and not apparent on the face of the verdict, it is sometimes proper to receive the affidavits of the jurors to ascertain their true verdict.*" (Italics ours.)

It is stated by the court in *Consolidated Rendering Co. v. New Haven Hotel Co.,* 300 Fed. 627 (at p. 629):

> "A distinction has arisen in the consideration of cases in which the verdict of a jury is sought to be corrected between those cases which present a situation where there has been a misapprehension as to the law, error in computation, irregular or illegal methods, of a misunderstanding as to how the proceeds are to be divided, as in the case at bar, and those cases which show that there has been a clerical error in the real verdict which the jury actually agreed upon. In the former class the evidence of the jurors is invariably excluded, in the latter case the correction is made.

Also see *Bateman v. Donovan,* 131 Fed. 759 (at p. 765):

> "* * * many cases have recognized that in some instances affidavits and testimony of jurors may properly be admitted, such as for the purpose of correcting clerical mistake in the jury's uttered verdict * * *

"If a verdict is informal, but otherwise sufficient, in that it is responsible to all the issues the Court may enter it in proper form."

Cyclopedia of Federal Procedure (2d Ed.), Vol. 8, p. 18.

California also recognizes the authority of the trial court to amend a jury verdict to make it properly reflect the intent of the jury.

A California decision on precisely the same question as the one at bar is found in *Phipps v. The Superior Court of Alameda County,* 32 Cal. App. 2d 371, 89 P. 2d 698. There the jury rendered its verdict in favor of the plaintiff and against the defendant and awarded the plaintiff $2500.00 against each of the defendants. The trial court ordered the verdict corrected so as to make the total verdict for $2500.00 instead of $5000.00. In affirming this action by the trial court it was stated:

"Admittedly a trial court upon its own motion or on *ex parte* application has jurisdiction to correct mistakes in its orders and records which are not actually the result of the exercise of judgment." (*Quoting Estate of Burnett,* 11 Cal. 2d 259, 79 P. 2d 89.)

At page 374 the court states:

"The court does not have the right to correct a proper judgment but it has the right to change the judgment in accordance with the actual decision." (Citing cases.)

See also:

Weddle v. Loges, 52 Cal. App. 2d 115, 125 P. 2d 914;

Curtis v. San Pedro Transportation Co., 10 Cal. App. 2d 547, 75 P. 2d 1072;

Truebody v. Jacobson, 2 Cal. 281.

Accordingly, it is submitted that there occurred no "grave Prejudicial error" or any error at all by the trial court in correcting the verdict in this case.

Conclusion.

It is therefore respectfully submitted that:

1. The defendant, Woodworkers Tool Works, Inc., a corporation, was properly served with process in this action and was subject to the jurisdiction of the District Court of the Southern District of California.
2. That the defendant company was guilty of negligence, that that negligence was the direct and proximate cause of plaintiff's injury, and that there was a direct causal connection between the breaking of the panel head and the injury sustained by the plaintiff.
3. That the doctrine of *res ipsa loquitur* was applicable in this case.
4. That the special damages awarded to the plaintiff were supported by the evidence and were not contrary to law.
5. That the foreman of the jury did not impeach the verdict of the jury but merely called the trial court's attention to a clerical error committed upon his part in filling out the verdict.

It is therefore urged that there were no errors committed at the trial and that appellant motion to dismiss, motion for nonsuit, motion for directed verdict and motion for judgment *non obstante veredicto* were properly denied.

Accordingly it is respectfully submitted that no grounds for reversal of the judgment exist in the instant case.

Respectfully submitted,

JOHN W. OLSON,
Attorney for Appellee.